

BOARD OF ZONING APPEALS

MEETING MINUTES

NOVEMBER 19, 2015

AGENDA

- 1. Kittrell Residence – Administrative Appeal 15-081AA** **5051 Brand Road**
Administrative Appeal (Postponed)
- 2. Lauer Residence – Building Code Appeal 15-098BCA** **8924 Lea Court**
Building Code Appeal (Approved 3 – 0)
- 3. Earl Residence – Setback Variance – Fence 5735 Desmond Court**
15-107V (Non-Use) Area Variance Side Yard Setback (Approved 2 – 1)
(Non-Use) Area Variance Rear Yard Setback (Disapproved 2 – 1)

Vice Chair Jamie Zitesman called the meeting to order at 6:52 p.m. Other Board members present were Martha Cooper and Patrick Todoran. Brian Gunnoe and Rion Myers were absent. City representatives present were Tammy Noble, Jeff Tyler, and Flora Rogers.

Motion and Vote

Mr. Zitesman moved, Mr. Todoran seconded, to accept the documents into the record. The vote was as follows: Ms. Cooper, yes; Mr. Todoran, yes; and Mr. Zitesman, yes. (Approved 3 – 0)

Motion and Vote

Mr. Todoran moved, Ms. Cooper seconded, to approve the September 24, 2015 meeting minutes. The vote was as follows: Mr. Zitesman, yes; Ms. Cooper, yes; and Mr. Todoran, yes. (Approved 3 – 0)

Motion and Vote

Ms. Cooper moved, Mr. Zitesman seconded, to approve the 2016-2017 meeting dates as presented. The vote was as follows: Mr. Todoran, yes; Mr. Zitesman, yes; and Ms. Cooper, yes. (Approved 3 – 0)

Communications

Tammy Noble said there are a couple of potential cases for the December meeting.

Ms. Cooper asked to confirm the date of the December meeting.

Mr. Zitesman confirmed the December meeting is the 17th.

Administrative Business

Mr. Zitesman swore in anyone that intended to address the Board, including the applicants and staff.

NEW CASES:

- 1. Kittrell Residence – Administrative Appeal 15-081AA** **5051 Brand Road**
Administrative Appeal

Mr. Zitesman said this is an application for an appeal was postponed prior to the meeting.

**2. Lauer Residence – Building Code Appeal
15-098BCA**

**8924 Lea Court
Building Code Appeal**

Jeff Tyler said this is a Building Code Appeal to the decision of the Building Official for a residence located at 8924 Lea Court to the installation and accessibility requirements for mechanical parts associated with a whirlpool tub for which the Building Code requires that there is immediate access to the blower motor that is located beneath the tub. He said the Building Code requires that the Electrical Code be the Code of reference and the Electrical Code reference the installation manual that says that the blower motor must be readily accessible. He said the installation manual requires that the access must provide unrestricted access to the blower and be located immediately next to the blower. He said there interpretation has always been in the location that is shown in the manual and provide along the side of the tub closest to the blower. He said in this instance, the applicants are proposing an opening underneath the tub, via a crawl space, which is readily and easily accessible. He said it does not meet the letter of the Code but as the Building Official he feels it meets the intent of the Code and he is not opposed to this installation. He said putting an access door next to the tub the applicants stated that it will not be aesthetically acceptable and would be too visible. He said the manufacturer has written that the warranty will not be voided by the installation with the alternative access from underneath and he is supportive of the proposal.

Mr. Tyler said this appeal is to Section 110.03B examination identification installation and use of equipment, installation and use equipment shall be installed and used in accordance with the instructions included in the listing or labeling requirements. He said the installation instructions for the whirlpool tub located in the master bathroom requires that the blower motor be readily accessible, the access must be located immediately next to the blower as per the installation manual. He said the recommendation is for approval with no conditions.

Mr. Zitesman said the blower motor is readily accessible by the access below. He said the access being next to the blower does not necessarily say that the access has to be next to the tub.

Mr. Tyler said the manual shows a diagram showing the blower accessible next to the tub and with the access from beneath it meets the requirement.

Mr. Zitesman asked what is the purpose of the required opening.

Mr. Tyler said it is for servicing of the motor.

Mr. Zitesman asked if there was anyone from the public that would like to comment to this application. [There were none.]

Motion and Vote

Ms. Cooper made a motion, seconded by Mr. Todoran, to approve this Building Code Appeal that requires that a mechanical component, a blower motor, for a whirlpool bath tub be accessible immediately next to the blower motor, finding that the alternative method for access to the blower motor is an acceptable alternative to the requirements of the Building Code and meets all the applicable review criteria. The vote was as follows: Mr. Zitesman, yes; Mr. Todoran, yes; and Ms. Cooper, yes. (Approved 3 – 0)

**3. Earl Residence – Setback Variance – Fence
15-107V**

**5735 Desmond Court
(Non-Use) Area Variance**

Tammy Noble said this is a non-use area variance application to the side and rear yard setback requirements for the construction of a fence for a residential site located on the south side of Desmond Court approximately 325 feet west of Earlsford Drive. She said the site is approximately .5-acre east of Scottish Corners Elementary school and has frontage along Desmond Court. She said the rear yard abuts

Sells Mill Drive and the site is pie shaped which is typical of a site located on a cul-de-sac and extends along the Dublin Shier subdivision which is the entire PUD that encumbrances this site.

Ms. Noble said the site is fully developed with a single family residential structure that is centered to the front of the property. She said the site also has a pool to the southwest corner of the site and with activity courts to the rear of the swimming pool. She stated the pool has an existing fence that is required by Code. Ms. Noble said the applicant is proposing a fence to be located within two setbacks, side and rear yard setbacks. She described the location of the fence and said it is encroaching the side yard setback by five feet and the rear yard setback by 14 feet.

Ms. Noble said they have reviewed this site approximately a year ago with a similar request that encroach closer to the easement under a different property owner.

Ms. Noble said the applicants are proposing the fence in its location to maximize the area of the fence and attempting to create a fenced in yard for the security of pets and to maximize the area of the rear yard. She said part of the request is based on the fact that they abut on a public roadway, to the rear, and have a walking path along the rear of their property. She said the fence would separate public pedestrian traffic from their yard.

Ms. Noble said in terms of criteria and special conditions are created by the applicants and being that they are new owners of the property and have not contributed to any factors of the property and no actions that they have taken has contributed to anything that they are reviewing. She said in terms of impair to the intent of the requirement the purpose of the Fence Code as it is today is restrictive and is to allow minimal areas of fenced in areas in residential properties without fully securing rear properties and although the applicants proposal doesn't quite extend into fully encompassing the rear property but the intent is to allow for minimum areas of yards to be enclosed.

Ms. Noble said based on the analysis they are recommending disapproval for the application and they are glad to answer any questions about this application.

Ms. Cooper said the drawing shows the applicant wanting to connect to an existing fence on the neighbor's property and asked that it be described in more detail.

Ms. Noble said this is an older community so some of the fences in the neighboring properties are non-conforming including the property to the east. She said the applicants are attempting to abut the existing fence on the neighboring property and utilize it as their eastern portion of the fence which is typical.

Ms. Cooper asked to see the line of the neighbors existing fence.

Ms. Noble showed the properties and said it is a board on board solid fence.

Mr. Zitesman asked for the allowable fence dimensions.

Ms. Noble showed an illustration showing the two setback requirements and said they the side yard setback is a minimum of five feet along the eastern property line which causes a five foot gap between the fences and showed the rear yard setback line.

Mr. Zitesman asked if they ran the fence to the east to the existing fence would it be permissible.

Ms. Noble said if they abutted the neighbors' fence they would need a variance for the side yard setback.

Ms. Cooper said the neighbors would need a variance to repair their existing fence.

Ms. Noble agreed that they are allowed to do a certain amount of maintenance to the existing fence, but if they remove the fence then they have to build it in the proper location.

Mr. Zitesman asked if there was anyone from the public that would like to comment to this application.

Gregory Earl, 5735 Desmond Court, said he is present with his wife Jennifer.

Mr. Zitesman asked where the neighbors' fence terminates.

Mr. Earl said the neighbors' fence terminates where theirs begins and there are three other houses to the east of their house that go up to corner of Earlsford that has a continuous fence line at approximately the same location. He said the first house has a split rail fence, the second house has a slatted fence, and his neighbor has a slatted fence and theirs would start at the same corner and come across.

Mr. Zitesman said they should know they have been through this type of request with the previous property owners.

Mr. Earl said they had learned of that request after the fact and had seen their application. He said having read their application, some of the feedback that was given in the analysis talks about maximizing the yard and minimizing costs and other things and didn't address the uniqueness of the lot. He said their point in their application is that this lot is unique having only 52 feet from the rear corner of the house to the property line and it is restrictive to the 30 foot setback is a substantial loss of their rear yard.

Mr. Zitesman asked if they have explored the option of an invisible fence for the pet.

Mr. Earl said they have explored that option with two invisible fence companies and it is an option but they were not excited about that option even though the salesman guarantee that the dog will not cross the invisible fence boundary, they fear it would not be respected by their dog. He said their previous house had a physical fence and their dog is comfortable with a physical fence and they are concerned with testing out an invisible fence with their dog being a boxer and can be friendly and sometimes aggressive and they did not want to take that chance of the dog chasing a squirrel or a kid through the boundary.

Mr. Zitesman said the challenge they have is that everyone feels they need a special fence and they are charged to evaluate the cases with the review criteria. He said there is nothing from the analysis that warrants a variance. He asked for the applicant to identify which of the review criteria has been misinterpreted by staff.

Ms. Cooper said that she believes some unique characteristics should include being adjacent to Scottish Corners Elementary and having on street parking that is available for public parking adjacent to the rear of their home.

Mr. Earl said they were trying to follow the existing tree line.

Ms. Cooper said she understood they would not be disturbing the tree line but the argument is that the other fence is on the property line from the pool and from that perspective that is a pre-existing fence and from the corner of the eastern property if they came along and closer in from that corner and not following an existing stone path that is not on the property setback line it would be less of an impact to the variance being requested because they would be moving into that line. She said that may rise to the

level of going back to the fourth criteria where everyone around you has pre-existing fences and would be possibly met with a special condition in her opinion.

Mr. Zitesman said the special conditions is just for the subject site.

Ms. Noble said it is the conditions of the site and they could consider things that are off-site in the sense that, whatever those conditions are impact the site.

Mr. Earl said the parking spaces only applies to his property or maybe two others.

Ms. Cooper said the parking spaces along that road is heavily used and Scottish Corners is built within a public park and the bike path runs through and is very unique circumstances related to this property that should be considered that do not apply to all other properties within the City.

Mr. Earl said he looked at the purpose and scope of the fence regulation stating that it is for the conservation and protection of property, the insurance of safety and security, the enhancement of privacy, and the improvement of visual environment. He said they are attempting to meet all of those principles as he could. He said the rear yard setback that takes over half of their property because of the unique depth that would be only 20 feet from the house.

Ms. Noble said that there are many properties throughout the city that based on the size of the lot, size of the house and required setbacks, they have less than 5 or 10 feet in which to use as a fenced area.

Ms. Cooper asked if the gas lines or sewer lines were marked on the property.

Ms. Noble said there is no easements on the side of the property so they would not be located along that side. She said there is a significant easement along the back of the property but she believes it might be related to the location of the bike path.

Mr. Earl said there is a 15 foot utility easement for the transformers sitting in the middle of the easement, but they have not had OOPS indicate where the primary line is located but he suspects the power cable comes through the center of the 15 foot utility easement.

Mr. Zitesman said the issue is Ms. Noble's point because every other house in the neighborhood would be held to this precedent and it is the challenge that the applicant must overcome.

Mr. Earl said he would be willing to amend the request to only requesting a variance to the rear yard setback. He said the request for the side yard variance was based on common sense and practicality than necessity.

Mr. Zitesman said he cannot recall all the years that he has been on the board, he doesn't recall granting any variance for any fence outside the building line.

Ms. Cooper said that she believes this property has special conditions but in the end all three of the criteria must be met and she agrees with the Vice Chairman that this has not been met.

Ms. Noble said they have granted one fence variance because it was a non-conforming fence that they were able to be maintained in the same location. She said the applicant attempted to build the fence in that same location and encountered utility lines. She said the Board granted a variance to move the fence further into the rear yard setback based on the fact that it was not conforming, the applicant was legally able to rebuild in the same location, there were physical barriers to rebuilding it in that permitted location, and there was existing vegetation that would be lost by located in the conforming location. She said it was a very unique circumstance.

Mr. Earl said the third criteria is that granting the variance will not cause a substantial adverse effect to property or improvements in the vicinity and he believes the issue is the "or will not materially impair the intent and purpose of the requirement being varied in this chapter" which is the challenging hurdle they are trying to get over. He said the requirement is to keep open landscapes and not obstructing corridors and not in fencing properties and if they move the side yard off the neighbors fence and the proposed fence is behind the blockade of foliage it seems reasonable that they could say that this application is not materially impairing the intent or purpose of the requirement.

Mr. Zitesman said there are a lot of trees between the street and this property which creates a natural barrier and if they are saying the fence will not be noticed than what would be the point.

Mr. Earl said the fence is also to keep the dog in their yard.

Mr. Zitesman said looking at the site there is a good portion amount of space within the build line and the house.

Mr. Todoran asked if they change the proposal to putting the fence on the building and abut the neighboring fence then the variance is for only the five foot side yard setback.

Ms. Noble agreed.

Ms. Cooper asked if all the other properties around the cul-de-sac are the fences on the property lines or on the setbacks.

Ms. Noble said only the properties along this roadway were reviewed but most of the homes were built in the early 90's and with the fence Code going into effect in the early 2000's then there are quite a few fences that do not meet the current Code.

Ms. Cooper said having a five foot corridor between the properties it will become a pedestrian path.

Mr. Zitesman said if they did change to the build line and abutting the adjacent fence then the five foot variance would be less objectionable but they have to meet the objective criteria.

Ms. Noble said it is more difficult for the side yard variance because of the unique circumstances being that the adjacent property owner has a fence that is fine but then anytime they have an adjacent property owner with a fence on the property line, the Board would have to approve the variance to be consistent with the decision.

Mr. Zitesman said the purpose of the fence regulation is to prevent perimeter fences along side and rear property lines. He said and that is what is being proposed.

Mr. Zitesman said he closed this public portion of the discussion and open the request to the Board.

Ms. Cooper said she had already expressed her opinion during the public portion and does not have anything additional to add.

Mr. Zitesman said he does not believe the criteria has been met.

Motion and Vote

Mr. Zitesman made a motion to disapprove this non-use variance of Section 153.080 (A) and (B) to permit a fence that encroaches 5 feet into the side yard setback and 14 feet into the rear yard setback

find that the request does not meet the review criteria for a non-use (area) variance. Ms. Cooper seconded the motion. The votes was as follows: Mr. Todoran, no.

Ms. Noble said if Mr. Todoran was voting in favor of the application.

Mr. Todoran said he is does not want to disapprove the application and is voting against the motion of disapproval.

Ms. Noble asked if Mr. Todoran can summarize how the applicant meets the special conditions and the requirements.

Mr. Todoran said the reason he is voting this way is that they are on the Board of Zoning Appeals and they are here to appeal different situations and different variances. He said he knows that Council wants them to follow the Code but part of their purpose is to hear unusual instances that varying from the Code is appropriate. He said he does not think the property or City will be impacted if they approve this fence being put along the side yard setback. He said every case has a different set of circumstances and it is their responsibility to hear those cases and not just follow the Code. He said that is the reason for his no vote.

Ms. Cooper clarified that the current motion if for both requests and asked if they could vote on each request separately.

Ms. Noble said they could continue to the vote and hear the request as one motion or they could withdraw the current motion and make two motions for each variance request.

Ms. Cooper said they would like to hear them separately.

Ms. Noble said they would need to resend the motion as it stands.

Mr. Zitesman rescinded his motion.

Motion and Vote #1

Ms. Cooper made a motion, to approve this non-use (area) variance to Section 153.080 (B) to permit a fence to encroach 5-feet into the side yard setback finding that the request meets all the required review criteria as discussed and does not impair the intent and purpose of the requirement.

Ms. Cooper said the unique circumstance is that the fence already exists on the side property line and meeting the setback requirement would create a five foot path between the properties. She said the path would be hard to maintain and a nuisance. She said they have met all three of the criteria, in the first section, and two of the four criteria in the second section.

Mr. Todoran seconded the motion.

The vote was as follows: Mr. Zitesman, no; Mr. Todoran, yes; and Ms. Cooper, yes. (Approved 2 – 1)

Motion and Vote #2

Mr. Zitesman made a motion, seconded by Ms. Cooper, to disapprove this non-use (area) variance to Section 153.080 (B) to permit a fence to encroach 14-feet into the rear yard setback finding that the request does not meet the review criteria. The vote was as follows: Mr. Todoran, no; Ms. Cooper, yes; and Mr. Zitesman, yes. (Disapproved 2 – 1)

Ms. Noble said the rear yard setback did get disapproved and the side yard variance did get approved so the applicant can move forward with their fence permit when they are ready. She thanked the applicants.

Mr. Zitesman said the next meeting is scheduled for December 17, 2015, and adjourned the meeting at 8:23 p.m.

As approved by the Board of Zoning Appeals on January 28, 2016.